July 20, 2005 FILE NO. – 2004/040

SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2005 – 005

SaskEnergy Incorporated

Summary: The Applicant requested records from SaskEnergy Incorporated ("SaskEnergy"). SaskEnergy produced a fee estimate. The Applicant requested that the Commissioner review the fee estimate. The Commissioner found that he had authority to review the fee estimate under section 7(2)(a) of *The Freedom of Information and Protection of Privacy Act*. The Commissioner found that the fee estimate was excessive and recommended it be reduced.

Statutes Cited: **Saskatchewan:** *The Freedom of Information and Protection of Privacy Act*, [S.S.1990-91, c. F-22.01 as am.], ss. 7, 8, 9; *The Freedom of Information and Protection of Privacy Regulations*, c. F-22.01 Reg. 1, ss 6, 7, 8 and 9; **Ontario:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 57(3); **Alberta:** *Freedom of Information and Protection of Privacy Act*, R.S.A.2000, c. F25, s. 93(3); **British Columbia**: *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 as am. s. 75(4); **Manitoba:** *Freedom of Information and Protection of Privacy Regulation* s. 9(1); **Nova Scotia:** *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 as am., s. 11(7); **Prince Edward Island:** *Freedom of Information and Protection of Privacy Act*, S.P.E.I. 2001, c. 37 as am., s. 76(4)

Authorities Cited: Saskatchewan OIPC Reports: 2004-003, 2000/029, 2001/015, 2003/031; Ontario OIPC Order 81, M-301, P-1465; PO-2299, PO-1953, MO-1380, MO-1456; Alberta OIPC Order 99-011, Adjudication Order #2, May 24, 2002; British Columbia OIPC Order 55-1995.

Other Resources Cited:

Alberta Government Services FOIP Bulletin Number 1, p. 1, 10; *Limited Access: Assessing the Health of Canada's Freedom of Information Laws*, Alisdair Roberts, 1998; Senate Standing Committee 1987 Report; *Annual Report 1993-94*, Information Commissioner of Canada; *Open Government: A Review of the Federal Freedom of Information Act 1982*, Commonwealth of Australia 1995; *Government Information: Access and Privacy*, McNairn and Woodbury, Thomson Carswell; *Legislation on Public Access to Government Documents*, Government of Canada - Supply and Services: 1977; *Issues and Options Regarding Fees Under The Access to Information Act*, E. Denham, November 20001; *Processing Voluminous Requests - A Best Practice for Institutions*, OIPC Ontario and Ministry of Natural Resources, September 2002.

I BACKGROUND

[1] SaskEnergy acknowledged receipt of an Access to Information Request form from the Applicant on April 29, 2004. The request was for the following record:

> *"Please provide all information prepared by or for or held by you that was provided to the firm Meyers Norris and Penny for work on the utility bundle matter [referenced by Premier Lorne Calvert on Sept. 2, 2003]. Please include all requests made of you by MNP and responses to same. If the material was prepared electronically, I would be prepared to receive it that way, too."*

[2] SaskEnergy wrote the Applicant on May 27, 2004 advising, in part, as follows:

> *In accordance with subsection 7(2)(a) of The Freedom of Information and Protection of Privacy Act (the "Act") and section 6 of the Regulations to the Act, the Corporation will provide access to the records upon payment of the fee. In accordance with subsection 9(2) of the Act, we estimate that the time to search for the record and prepare it for disclosure will be 4.5 hours in excess of the 2 hours free search and preparation time, and therefore, the fee will be $135.00 (4.5 x2 x $15.00/half hour). In addition, the fees for photocopying will be $118.75 (475 pages x $.25/page).*

[3] Preparatory to that correspondence, Emails were scanned by the Rates Manager for Gas Supply and by a Rates Analyst. In addition the Vice President of Gas Supply also examined records gathered in response to the Applicant's request but the estimate included none of the Vice President's time. On May 28, 2004, the Applicant submitted a Request for Review of the fee estimate to our office.

[4] On June 16, 2004, the Commissioner attended at the offices of SaskEnergy to review with that corporation's Access Officer the process followed in calculating fees. That Access Officer functions as a "FOIP Coordinator" as that position has been described in the Saskatchewan FOIP FOLIO.[1] We subsequently received a letter from that Access Officer further clarifying the fee estimate and its preparation. On July 28, 2004 we forwarded a copy of that letter to the Applicant.

[5] On August 10, 2004 our office received a further submission from the Applicant responding to the submission of SaskEnergy.

[6] SaskEnergy advised that it undertook the search for responsive records and that the actual search time for two individuals employed by SaskEnergy was 5 hours. Virtually all of the records were in electronic form and were identified quickly because this was an active matter at the time the access request was received. The "sort" feature for Emails was used and made the information readily available in an expeditious fashion. The majority of the 5 hours was spent by the Manager and the Analyst on checking each of the Emails for attachments and for printing the Email and attachment. There was some additional time spent on photocopying hard-copied material, including some hand-written notes. In addition, there was approximately 1 hour spent by the SaskEnergy Access Officer discussing the scope of the request, providing guidance in preparing the search for the record, and for an initial review of the record preparing it for disclosure. SaskEnergy advised that, "*The detailed time for preparing the record for disclosure, including the determination whether the information was releasable and whether any exemptions are applicable has not yet been completed*".

[1] *Role of Information and Privacy Co-ordinators*, January 2004, page 3; available online at: www.oipc.sk.ca under Newsletters

[7] SaskEnergy noted that it had not required a deposit of one half of the estimated fees pursuant to section 9(4) of the Act. In addition, SaskEnergy undertook that, *"In addition, upon completion of the preparation of the record for disclosure, the corporation would provide the applicant with a detailed actual accounting of the number of photocopies and the search and preparation time and would charge the applicant the lesser of the actual allowable fees and the estimated fees."*

II RECORDS AT ISSUE

[8] We have not undertaken a page by page review of the records responsive to the access request since the issue on this review is the appropriateness of the fee estimate produced by SaskEnergy.

[9] I have determined however that the records determined to be responsive consist of the following elements:

(a) A large number of Email messages to or from at least two different employees of SaskEnergy – the Rates Manager for Gas Supply and a Rates Analyst;
(b) Rate model summary; and
(c) Manager's and Analyst's materials including file notes

[10] The record consists of approximately 475 pages. I understand that the responsive materials were intermingled in SaskEnergy's files with general rates material that would not be responsive to the Applicants' request.

III ISSUES

1. ***Has the duty to assist been met?***

2. ***What is the purpose of a fee estimate?***

3. ***Is the Commissioner entitled to review a fee estimate/fees?***

4. ***Who should bear the burden of proof when assessing a fee estimate?***

5. ***Are the fees estimated by SaskEnergy reasonable?***
   (1) Searching for a record
   (2) Preparing the record for disclosure

6. ***Can there be a fee/fee estimate if a record is severed?***

7. ***How should a fee estimate be furnished to an applicant?***

IV SCOPE OF THIS REVIEW

[11] At the time the Applicant requested a review by our office, the issue related to a "fee estimate" of 6.5 hours x 2 employees (less 2 "free" hours) x $15 per half hour for a total of $135.00. In fact there is an error in the calculation since the total should have been $270. The 2 "free" hours are prescribed by section 6(2) of *The Freedom of Information and Protection of Privacy Regulation,* [2]("the Regulation").

[12] By the time we met with the Access Officer for SaskEnergy, the fee estimate had been reduced from 6.5 hours to 5 hours. This reflected additional work that had been done in printing and reviewing responsive records and a more accurate understanding by SaskEnergy of the work involved in responding to the access request.

[2] Chapter F-22.01 Reg 1, section 9

V DISCUSSION OF THE ISSUES

[13] The relevant provisions of *The Freedom of Information and Protection of Privacy Act* ("the Act") are as follows:

Section 7

7(1) Where an application is made pursuant to this Act for access to a record, the head of the government institution to which the application is made shall:

(a) consider the application and give written notice to the applicant of the head's decision with respect to the application in accordance with subsection (2); or

(b) transfer the application to another government institution in accordance with section 11.

(2) The head shall give written notice to the applicant within 30 days after the application is made:

(a) stating that access to the record or part of it will be given on payment of the prescribed fee and setting out the place where, or manner in which, access will be available;

(b) if the record requested is published, referring the applicant to the publication;

(c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication;

(d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;

(e) stating that access is refused for the reason that the record does not exist; or

(f) stating that confirmation or denial of the existence of the record is refused pursuant to subsection (4).

Section 8

8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

Section 9

9(1) An applicant who is given notice pursuant to clause 7(2)(a) is entitled to obtain access to the record on payment of the prescribed fee.

(2) Where the amount of fees to be paid by an applicant for access to records is greater than a prescribed amount, the head shall give the applicant a reasonable estimate of the amount, and the applicant shall not be required to pay an amount greater than the estimated amount.

(3) Where an estimate is provided pursuant to the subsection (2), the time within which the head is required to give written notice to the applicant pursuant to subsection 7(2) is suspended until the applicant notifies the head that the applicant wishes to proceed with the application.

(4) Where an estimate is provided pursuant to subsection (2), the head may require the applicant to pay a deposit of an amount that does not exceed one-half of the estimated amount before a search is commenced for the records for which access is sought.

(5) Where a prescribed circumstance exists, the head may waive payment of all or any part of the prescribed fee.

[14] The Regulation provides as follows:

Section 6

6(1) Where access to a record or part of a record is given by providing the applicant with a copy of the record, the following fees are payable at the time access is given:

(a) for a photocopy, $0.25 per page;

(b) for a computer printout, $0.25 per page;

(c) for a paper print from microfilm, $0.50 per page;

(d) for 16 millimetre microfilm duplication, non-silver, $32 per 30.5 metre reel;

(e) for 35 millimetre microfilm duplication, non-silver, $35 per 30.5 metre reel;

(f) for microfiche duplication, non-silver, $0.50 per fiche;

(g) for a print of a photograph or slide:

(i)$3 per 31/2" x 5" black and white print

(i.1) $6 per 3 ½" x 5" colour print;

(i.2) $5 per 4" x 6" black and white print;

(i.3) $8 per 4" x 6" colour print;

(i.4) $7 per 5" x 7" black and white print;

(ii) $10 per 5" x 7" colour print;

(iii)$9 per 8" x 10" black and white print;

(iv) $12 per 8" x 10" colour print;

(v) $18 per 11" x 14" black and white print;

(vi) $21 per 11" x 14" colour print;

(h) for a print mentioned in clause (g) for which a negative must be made:

(i) $9 per 3 ½" x 5" black and white print;

(i.1) $12 per 3 ½" x 5" colour print;

(i.2) $11 per 4" x 6" black and white print;

(i.3) $14 per 4" x 6" colour print;

(i.4) $13 per 5" x7" black and white print;

(ii) $16 per 5" x 7" colour print;

(iii)$15 per 8" x 10" black and white print;

(iv)$18 per 8" x 10" colour print;

(v) $24 per 11" x 14" black and white print;

(vi)$27 per 11" x 14" colour print;

(i) for an audio cassette, $15 for each hour portion of an hour;

(j) for a one-half inch video cassette, $35 for each hour or portion of an hour;

(k) for a floppy disk, $10;

(l) for a form of record not mentioned in clauses (a) to (k), the actual cost of copying the record.

(2) Where time in excess of two hours is spent in searching for a record requested by an applicant or in preparing it for disclosure, a fee of $15 for each half-hour or portion of a half-hour of that excess time is payable at the time when access is given.

(3) Where a search and retrieval of electronic data is required to give access to a record requested by an applicant, a fee equal to the actual cost of the search and retrieval, including machinery and operator costs, is payable at the time when access is given.

Section 7

7 (1) For the purposes of subsection 9(2) of the Act, $50 is prescribed as the amount of fees beyond which an estimate must be given by the head.

(2) Where the amount of an estimate exceeds the actual amount of fees determined pursuant to section 6, the actual amount of fees is the amount payable by the applicant.

Section 8

8 (1) No fees are payble where access to a record is refused.

(2) Where a deposit has been paid pursuant to subsection 9(4) of the Act and access to the record requested is refused, the deposit is to be refunded to the applicant.

Section 9

9 For the purposes of subsection 9(5) of the Act, the following circumstances are prescribed as circumstances in which a head may waive payment of fees:

(a) where the actual cost of responding to an application varies from the total of the prescribed fees that are applicable in the application;

(b) where payment of the prescribed fees will cause a substantial financial hardship for the applicant and:

(i) in the opinion of the head, giving access to the record is in the public interest; or

(ii) the application involves the personal information of the applicant

(c) where the prescribed fee or actual cost for the service is $10 or less.

1. HAS THE DUTY TO ASSIST BEEN MET?

[15] SaskEnergy is required to discharge an implied duty to assist the Applicant when it responds to an access request.[3]

[16] In our discussions with the Access Officer for SaskEnergy, we were advised that the Applicant would be welcome to attend at the offices of SaskEnergy to review the responsive record and determine which pages he wished to be photocopied. This will likely reduce substantially the estimated $118 to photocopy all responsive records. This offer is a positive development given the 'duty to assist the applicant' that we have held is implicit in the Act. In addition, SaskEnergy proceeded to complete the search for responsive records even though the question of fees had not yet been resolved. This worked in the Applicant's favour since the original estimate of 6.5 hours was reduced to 5 hours.

[3] Saskatchewan OIPC Report 2004-003, [12] to [15]; available online at www.oipc.sk.ca under Reports.

[17] I find that SaskEnergy responded to the Applicant in a timely fashion and in accordance with its understanding of past decisions by Saskatchewan Information and Privacy Commissioners over the first 12 years of the Act. I want to acknowledge the significant efforts that the SaskEnergy has made to accommodate the Applicant and to follow its understanding of the legislative requirements. I have no hesitation in finding that SaskEnergy has discharged its duty to assist the Applicant insofar as the communication with respect to fees is concerned.

2. WHAT IS THE PURPOSE OF A FEE ESTIMATE?

[18] Section 9(2), (3) and (4) of the Act and section 7(1) of the Regulation provide that when the estimated fees exceed $50 the head of a government institution must provide "*a reasonable estimate of the amount* [of fees]" and that the 30 day period to respond to an access request is suspended "*until the applicant notifies the head that the applicant wishes to proceed with the application*".

[19] I note that in other provinces' access and privacy statutes, it is explicit that the applicant must be given the estimate "before providing the services".[4] I find that it is implicit in the Saskatchewan Act that the estimate should be provided to the applicant before the services are provided. Once the work has been done the fees would be precisely calculated and there would be no point in "estimating" fees. It would also make little sense to put the government institution to the considerable work of preparing the record for disclosure if the applicant was unwilling to pay the appropriate costs that the government institution is permitted to charge before providing access to the applicant.

[20] The Alberta Information and Privacy Commissioner observed that the provisions relating to fee estimates are of benefit to both the public body and the applicant.[5] I agree.

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[4] *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F25, section 93(3); *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 as am., section 75(4); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 57(3)

[5] Alberta Information and Privacy Commissioner Order 99-011; available online at www.oipc.ab.ca

[21] Alberta Government Services has published a bulletin to assist public bodies and applicants interpret and apply the fee estimates provisions in the FOIP Act in that jurisdiction. This includes the following:

> *The information in the estimate allows an applicant to gauge the scope a request and to modify a request that may not have been very clear. The requirement to provide an estimate also prevents a public body from doing more work than is necessary, particularly in the early stages of the process when the request is most susceptible to revision*
>
> ...
>
> *Fee estimates under the FOIP Act are generally judged on the basis of whether they are reasonable and equitable. A fee estimate is reasonable when it is proportionate to the work required on the part of a public body to respond efficiently and effectively to the applicant's request. A fee estimate is equitable when it is fair and even-handed, that is, when it supports the principle that applicants should bear a reasonable portion of the cost of producing the information they are seeking, but not costs arising from administrative inefficiencies or poor records management practices. .*[6]

[22] The Alberta bulletin referred to above also suggests some considerations that should be kept in mind when presenting the public body's position to the Commissioner:

- *How has the public body attempted to respond to the applicant's request? Has the public body fulfilled its duty to assist? Have all fees been determined openly and in consultation with the applicant?*

- *When it became apparent that fees would be substantial, did the public body work with the applicant to clarify or narrow the request and to establish a sound basis for estimating those fees?*

[6] Alberta Government Services FOIP Bulletin Number 1, page 1& 2; available online at www3.gov.ab.ca/foip

- *Can the public body present an affidavit justifying its fee estimate?*

- *Has the public body provided some information to the applicant free of charge or can it demonstrate that the current charges do not approach real costs in locating, retrieving, preparing and copying the records involved?*

- *Does the request involve a search through a large number of complex records? If so, would the request shift an unreasonable cost from the applicant to the general taxpayer? If fees were not collected, would the request interfere significantly with the operations of the public body?*

- *Are there extenuating circumstances, such as poor records organization, that have affected the public body's ability to locate and retrieve records effectively? If so, should this have been taken into consideration when assessing fees?*[7]

[23] I find the same considerations are useful in assessing fee estimates under the Act in this province.

[24] Given the purposes I have previously ascribed to the Act[8], I view the Act as an instrument to foster openness, transparency and accountability in government institutions. I want to ensure that fees do not present an unreasonable barrier to access to information in Saskatchewan. Consequently, this office will expect that fees should be reasonable, fair and at a level that does not discourage any resident from exercising their access rights. At the same time, the fee regime should promote and encourage applicants to be reasonable and to cooperate with government institutions in defining and clarifying their access requests.

[7] Bulletin Number 1: Fee estimates, page 11
[8] Saskatchewan Information and Privacy Commissioner Report 2004-003, [5] to [11]

3. IS THE COMMISSIONER ENTITLED TO REVIEW A FEE ESTIMATE/FEES?

[25] SaskEnergy is a "government institution" within the meaning of section 2(1)(d)(ii) of the Act. The Applicant has submitted to SaskEnergy an application for access to records in the possession or under the control of SaskEnergy in accordance with section 6 of the Act.

[26] The Act does not expressly provide for a review of fees or a fee estimate by the Information and Privacy Commissioner. We note however that in Report 2000/029, former Commissioner Gerrald Gerrand concluded that, *"In my view, Section 7(2)(a) The Freedom of Information and Protection of Privacy Act allows me to review the decision of a head of a government department regarding the fee applicable with respect to an application."* In that case Mr. Gerrand was dealing with a fee estimate from SPMC.

[27] Commissioner Gerrand further considered the appropriateness of the fees claimed by Saskatchewan Finance in his Report 2001/015. Finally, my immediate predecessor, Commissioner Rendek, considered the appropriateness of a fee estimate produced by Saskatchewan Liquor and Gaming Authority in his Report 2003/031.

[28] Although I am not bound by those earlier decisions, I have taken the position that, as a general rule, we will attempt to follow the interpretation of the Act that has been described by my predecessors unless there is some compelling reason to take a different view. I choose to follow the approach taken by the last two Commissioners and find that I have authority to review the fee estimate produced by SaskEnergy in this case.

4. WHO SHOULD BEAR THE BURDEN OF PROOF WHEN ASSESSING A FEE ESTIMATE/FEES?

[29] There is no explicit reference in the Act to the burden of proof in the circumstances where the Commissioner is reviewing a fee estimate. The burden of proof when the issue

is whether or not access shall be granted is on the head of the government institution. [9] Having regard to the purpose of the Act and the practice in other Canadian jurisdictions, I find that the head of the government institution should also bear the burden of establishing the reasonableness of the fee under the Act.[10]

5. ARE THE FEES ESTIMATED BY SASKENERGY REASONABLE?

[30] We note there do not appear to be significant advisory and interpretative materials available to government institutions in Saskatchewan when they determine what might be an appropriate fee. Also, since this is my first report dealing specifically with the question of fees under the Act, it may be useful to outline the approach this office will take to the calculation of fees in some detail.

[31] There is often a tension between the demands for a cost-recovery approach to access to information and the goal of greater transparency. Professor Alisdair Roberts commented as follows:

> *The premise underlying calls for improved cost-recovery – that FOI users are consuming an unreasonable amount of government resources—needs to be closely examined. For example, it is clear that a substantial proportion of costs associated with the administration of FOI laws are associated with weaknesses in methods of records management, or are driven by government's own demand for services from the FOI system. The federal study found that one-third of total FOI costs related to staff time spent in determining whether material should be withheld from requesters (Canada, Treasury Board Secretariat, 1996b, sec. 2.1).*[11]

[32] I am mindful of the following comments in the comprehensive report of the Australian Law Reform Commission on open government:

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[9] *The Freedom of Information and Protection of Privacy Act*, s. 61

[10] Ontario Information and Privacy Commissioner Order M-301, page 3; available online at www.ipc.on.ca; Alberta Freedom of Information and Protection of Privacy Guidelines and Practices: Bulletin 1: Fee Estimates, page 10; available online at http://www3.gov.ab.ca/foip/guidelines_practices/bulletins/bulletin1.cfm

[11] *Limited Access: Assessing the Health of Canada's Freedom of Information Laws*, Alisdair Roberts, 1998, Page 50; available online at http://www.cna-acj.ca/client/CNA/cna.nsf/object/LimitedAccess/$file/limitedaccess.pdf

The costs regime should not be inconsistent with the objects of the Act. It is counterproductive for the Act to encourage involvement in government but effectively disqualify citizens from participating by imposing prohibitive charges. The cost to agencies of administering the Act must be viewed in the context of the legislation's role in furthering democratic accountability.

> [A]*ny examination of the issue [of cost] should go beyond short-term expediency and include consideration of the crucial long-term issues concerning the nature of a true liberal democracy.*[12]

> [T]*oo much emphasis has been placed upon economic factors (such as cost recovery) at the expense of admittedly unquantifiable social (and political) benefits derived from the right of access to documents conferred by the FOI Act.*[13]

When assessing the cost of providing information under the Act it is important to remember the benefits that flow from the openness fostered by the Act, many of which are intangible and unquantifiable.

> *[$20 million is] a bargain for such an essential tool of public accountability. The law pays for itself in more professional, ethical and careful behaviour on the part of public officials who must now conduct public business in the open.*[14]

A strict application of the user-pays principle would almost certainly guarantee that the Act would fail in its objectives. [15] *Yet it can be argued that totally free access may place an unreasonable financial and administrative burden on agencies. In the Review's view, applicants should make some contribution to the*

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[12] L Dalton 'FOI-the irony of the information age' (1994), 68 *Law Institute Journal* 848, 850

[13] Senate Standing Committee 1987 Report para 19.5

[14] Information Commissioner of Canada, *Annual Report 1993-94*. Information Commissioner of Canada, Ottawa 1994, 11.

[15] In *Re Hesse and Shire of Mundaring* (unreported), WA Information Commissioner, 17 May 1994, the WA Information Commissioner stated that user pays is contrary to the principle in the legislation that access should be provided at the lowest reasonable cost

> *cost of providing government-held information but that contribution should not be so high that it deters people from seeking information. The fees and charges regime should reflect the fact that FOI Act is primarily about improving government accountability and the public's participation in decision making processes, not about generating revenue or ensuring cost recovery.*[16]

[33] The 1977 federal Green Paper identified that the objective of a fee structure was not total cost recovery, but rather, a requirement for a standard fee at the time of application, which included a certain amount of reproduction and search time.[17]

[34] In a research paper for the federal Access to Information Review Task Force, a consultant observed:

> *The* [federal] *Government's initial intention was that fees would not become a barrier to access by the average Canadian citizen. The fee schedule was never intended to pass on the actual costs of search, review, preparation and reproduction. The government was sensitive to the difficulty in charging for search fees because the costs would vary from department to department largely dependent on the efficiency of the records management system. Charges for reviewing documents for exemptions to disclosure were not contemplated because this activity could viewed as a de fact means of frustrating release.*[18]

[35] In the British Columbia Information and Privacy Commissioner's Order 55-1995, the Commissioner stated:

> *The point of the legislation is to ensure that government information is widely available, so as to improve the public accountability of our institutions. To that end obstacles, including fees, should be minimized and, in the case of an issue of public interest... waived."*[19]

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[16] ALRC 77, Open Government: a review of the federal Freedom of Information Act 1982; Commonwealth of Australia 1995; available online at http://beta.austlii.edu.au/au/other/alrc/publications/reports/77/ALRC77.html, c. 14, page 2

[17] Government of Canada: *Legislation on Public Access to Government Documents*, Supply and Services Canada: 1977, page 3

[18] *Issues and Options Regarding Fees Under The Access To Information Act*, November 2001, page 6; available online at http://www.atirtf-geai.gc.ca/paper-fees1-e.html

[19] Available online at www.oipc.bc.ca

[36] I note the following comments by Ms. Elizabeth Denham in her report to the federal Access to Information Review Task Force:

> *The British Columbia Access to Information Review Committee received more comments on fees for information requests than on any other issue. In its final report, the Committee stated its belief that the existing fee structure was acceptable - that it balanced the interests of the public bodies and individual requesters. The Committee stated that access to information is a right adhering to citizens, and that it enhances democratic governance by maintaining accountability, integrity and efficiency in the work of public bodies. The cost of freedom of information should be "considered a justifiable expense".* [20]

[37] Under the Act in Saskatchewan, there are 3 different kinds of fees: (1) fees for searching for a responsive record; (2) fees for preparing the record for disclosure and (3) fees for the reproduction of records. The cost of reproduction is not in issue in this review.

[38] In a review of a fee estimate, it is important for the public body to identify the time that it anticipates it will spend on each of those activities.

(1) Searching for a Record

[39] This relates to the personnel time involved in finding a responsive record. The type of work that can be covered in a fee estimate is addressed by two Ontario decisions that turned on the appropriateness of fees charged.

[40] In Ontario IPC Order M-301, the local authority had charged a total of 63.5 hours of search time and preparation that included the time spent in total by 2 clerical staff and three senior level staff. The local authority had supplied the relevant time records for those different employees. The records requested spanned a ten year period. It was held that the nature of the request required the search to be done by various senior level

[20] Op cit. , p. 7

employees. It was held that the local authority was not entitled to include the time spent actually photocopying the records with the calculation of search or preparation time.

[41] In Ontario IPC Order PO-2299, the searches were undertaken by branch employees who were familiar with the various record holdings in two different program areas. The question was whether the individuals who had done the search had undertaken the appropriate search activities. The request, after it was revised by the applicant, was quite narrow. It involved a list of consultants, a description of their responsibilities and the total fee paid to each of them. These records could be located electronically. Much of the need for manual searches related primarily to separating information based on the timeframe identified in the applicant's revised request. It was held this was not appropriate nor was it required in the circumstances. The original request was not time-specific and the timeframe had been reduced explicitly "to save the Ministry time". It was held simply not defensible for the Ministry to rely on this reduced time period in order to justify additional search fees for an extensive manual search.

[42] A useful document is *Processing Voluminous Requests - A Best Practice for Institutions*.[21] This document states, in part, as follows:

> *Search time consists of every hour of manual search time required to locate and identify responsive records. This includes staff time involved in searching for records, examining file indices, file plans or listings of records either on paper or in a computer, pulling paper files/specific paper records out of files, and/or reading through files to determine whether the records are responsive. Search time does not include time spent to copy the records, time spent going from office to office or off-site storage to look for the records or having someone review the results of the search.*[22]

[43] I understand from SaskEnergy that there was no single written submission from that Crown corporation to Myers Norris Penny. There was no 'hard copy' correspondence between the two organizations. I am advised that SaskEnergy was coping with a very

[21] Information and Privacy Commissioner of Ontario and the Ministry of Natural Resources, September 2002; available online at www.ipc.on.ca
[22] Ibid., p. 18

"tight timeline" in dealing with Myers Norris Penny. In addition, different persons within SaskEnergy were forwarding materials to Myers Norris Penny. I am advised that many assorted documents were sent at different times from SaskEnergy to Myers Norris Penny and these were not copied to a single data storage location.

[44] The SaskEnergy submission to Myers Norris Penny was comprised of a large series of separate Email messages that, at the time of receipt of the access request, were available only on the hard drive of several desk-top computers in SaskEnergy. Mindful of the utility of electronic search tools such as "sort" and "find" widely available in office software programs, I cannot understand why one person could not with relative ease quickly retrieve and scan archived Emails to identify and retrieve responsive Emails.

[45] Since the 475 pages of Emails can be quickly scanned by one individual, I find the 5 hours of search time for each of two employees claimed by SaskEnergy would be excessive. In any event it appears that the identification of responsive records and sorting of relevant Emails was done in an expeditious fashion. The majority of the time was spent by two employees "*checking each of the Emails for attachments and for printing the Email and attachment. There was also additional time spent on photocopying hard-copied material, including some hand-written notes.*"

[46] I note that in the Ontario Order P-1465 the Inquiry Officer determined that an experienced employee would be able to scan approximately six two-page electronic messages for responsive information in one minute.[23] If I assume that the 475 pages include mostly two page electronic messages that would mean in 40 minutes an employee could scan 238 Emails. Given there were attachments to many of the Emails I find that 90 minutes would be appropriate for the search for responsive records in this case.

[47] I have been advised that there was one hour charged for time spent by the Access Officer discussing the scope of the search with other employees and providing guidance on the search required. I find that this would not be compensable under the Saskatchewan fee regime.

[23] Available online at www.ipc.on.ca

[48] Although normally a compensable search would only involve a single employee, in the unique circumstances of this review, I am prepared to allow an additional 30 minutes for the supervisor's time in checking Emails and reviewing assorted other records to ensure all responsive records were located. In the result, I find that 120 minutes or 2 hours would be the time to search for responsive records.

(2) Preparing the Record for Disclosure

[49] I am advised by SaskEnergy that it had undertaken an initial review of the record with a view to preparing it for disclosure. I note that in the initial letter to the Applicant in response to the access request, SaskEnergy advised that *"...we estimate that the time to search for the record and prepare it for disclosure will be 4.5 hours in excess of the 2 hours free search and preparation time and therefore, the fee will be $135.00 (4.5x 2 x $15.00/half hour)."*

[50] Subsequent to the commencement of our review, SaskEnergy advised however that the 6.5 hours described in the estimate provided to the applicant exclusively related to time to search for responsive records. The Access Officer stated that "*Within this reasonable estimate, SaskEnergy did not include time spent by other individuals, such as Supervisors, in discussing the nature of the request, nor the time incurred by the Access Officer in preparing the record for disclosure*". Nonetheless, SaskEnergy in its dealing with the Applicant made no distinction between search time and preparation time.

[51] In my view, preparing the record for disclosure includes time anticipated to be spent physically severing exempt information from records. Time spent reviewing records for release and identifying records that require severing would be activities that should be considered as part of the government institution's general responsibilities under the Act. I find that the latter activities would not be captured by the phrase, "preparing a record for disclosure" in section 6(2)(b) of the FOIP Regulation.[24] I find that the FOIP Regulation contemplates a charge for actually severing a record. I find that it would not contemplate time for:

[24] Ontario IPC Order PO-1953-F, MO-1380, MO-1456

- Deciding whether or not to claim an exemption
- Identifying records requiring severing
- Identifying and preparing records requiring third party notice
- Packaging records for shipment
- Transporting records to the mailroom or arranging for courier service
- Time spent by a computer compiling and printing information
- Assembling information and proofing data
- Photocopying
- Preparing an index of records

[52] I have come to this conclusion after a careful review of all relevant past decisions of Saskatchewan Information and Privacy Commissioners, the object and history of the Act and the experience with similar laws in other Canadian jurisdictions. I am also mindful that fees and fee estimates can constitute one of the most significant barriers to access to information.

[53] I also want to address section 6(3) of the Saskatchewan Regulation. That provides as follows:

> *6(3) Where a search and retrieval of electronic data is required to give access to a record requested by an applicant, a fee equal to the actual cost of the search and retrieval, including machinery and operator costs, is payable at the time when access is given.*

[54] This provision appears to be unique to Saskatchewan. At the time the Act was proclaimed more than 12 years ago, office information technology would have looked very different than it does in 2005. I find that section 6(3) contemplates recourse to remote equipment that involves data stored in a fashion that restricts access to dedicated computer technicians. I find that section 6(3) would not have been intended to address the contemporary situation where office workers have ready access via their desktop computers to vast amounts of "electronic data".

[55] I have carefully reviewed all previous reports of this office and found only three that deal with the question of fees and fee estimates.[25] In Report 029 the then Commissioner made some observations about "preparing the record" but in fact based his decision on "searching for a record. In Report 015, the then Commissioner took the view that *"in general, time spent to decide what portions of a document or documents are severable, so that the remaining portions can be disclosed, may be allowable. Such time spent must be reasonable, and whether it is reasonable should be determined on an individual basis with regard to the volume and type of documents."* I note no authorities are cited in that report in support of the proposition that preparation time can include contemplation time. In Report 031, former Commissioner Rendek said:

> *The Applicant has raised the issue of whether "preparing" a document for disclosure includes a review of the document to be determined if it should be disclosed. Clearly, the review of the documents is necessary to determine whether portions need to be severed or whether the document must be entirely withheld from disclosure pursuant to either the mandatory or discretionary exemptions under the Act. The review may constitute the most significant portion of the time taken to prepare the document for disclosure. The wording of section 7(2) is therefore, in my opinion, broad enough to include the time taken to review a document and therefore the Respondent is entitled to charge fees for that time.*

[56] No mention was made in Report 031 of the prevailing practice of calculating fees in other Canadian jurisdictions. I accept that time must be spent by a government institution contemplating what exemptions may apply and to that extent agree with Mr. Rendek. It does not follow however that such time should be compensable under the Act and regulation. Indeed, it appears that in other Canadian jurisdictions, contemplation and consideration of applicable exemptions is viewed as part of the government institution's general responsibility to operate in a transparent and accountable fashion.

[57] I find the purpose in the access to information and protection of privacy statutes in other Canadian jurisdictions is the same or at least very similar to what I have found to be the

[25] Saskatchewan IPC Report 2003/031, Report 2001/015 and Report 2000/029

purpose of our Act.[26] It therefore makes sense to carefully consider and take guidance from the approaches taken to the same question in other jurisdictions.

[58] In a leading text on access to information in Canada, the authors stated:

> *For the purpose of calculating the search fee, preparation for disclosure will often include the task of severing non-disclosable portions of the record (see section 5.9 re severance). However, the time spent in a review of records in light of the various exemptions that either permit or require non-disclosure, and in consultations to determine whether to release the information, cannot generally be charged back to the requester.*[27] [emphasis added]

[59] In Alberta, the comparable provision is as follows:

> *12(1) An estimate provided under section 93(3) of the Act must set out*
>
> *(a) the time and cost required*
>
> *(i) to search, locate and retrieve the record;*
>
> *(ii) to prepare the record for disclosure;*
>
> *(a.1) the cost of copying the record;*
>
> *(b) the cost of computer time involved in locating and copying a record or, if necessary, re-programming to create a new record;*
>
> *(c) the cost of supervising an applicant who wishes to examine the original record, when applicable;*
>
> *(d) the cost of shipping the record or a copy of the record.*
>
> *(2) An estimate for access to a record of the personal information of the applicant need only include the cost of copying the record.*
>
> *(3) In the case of a continuing request, the estimate is to include the total fees payable over the course of the continuing request.*

[26] SK OIPC Report 2004-003, [5] to [11]
[27] Government Information: Access and Privacy, McNairn and Woodbury, Thomson Carswell, 2-34

(4) An applicant has up to 20 days to indicate if the fee estimate is accepted or to modify the request to change the amount of fees assessed.

[60] I note that in on page 70 of the 2005 edition of the Guidelines and Practices book produced by Alberta Government Services, the following appears:

The head of a public body may require an applicant who makes a request under the Act to pay fees for the following services:

- *locating and retrieving a record;*
- *producing a record from an electronic record;*
- *preparing a record for disclosure (to cover the time taken to physically sever the record);*
- *providing a copy of a record; creating a new record under section 10(2) of the Act; and*
- *supervising the examination of an original record.*

No fee may be assessed for time spent in reviewing a record to determine whether or not all or part of it should be disclosed. [emphasis added]

[61] In British Columbia, the comparable provision is as follows:

75(1) The head of a public body may require an applicant who makes a request under section 5 to pay to the public body fees for the following services:

(a) locating, retrieving and producing the record;

(b) preparing the record for disclosure;

(c) shipping and handling the record;

(d) providing a copy of the record

(2) An applicant must not be required under subsection (1) to pay a fee for

(a) the first 3 hours spent locating and retrieving a record, or

(b) time spent severing information from the record [emphasis added]

[62] In Ontario, the comparable provision is as follows:

> *57(1) A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,*
>
> *(a) the costs of every hour of manual search required to locate a record;*
>
> *(b) the costs of preparing the record for disclosure;*
>
> *(c) computer and other costs incurred in locating, retrieving, processing and copying a record;*
>
> *(d) shipping costs; and*
>
> *(e) any other costs incurred in responding to a request for access to a record*
>
> *(2) [repealed]*
>
> *(3) The head of an institution shall, before giving access to a record, give the person requesting access a reasonable estimate of any amount that will be required to be paid under this Act that is over $25.*

[63] SaskEnergy pointed out that it chose not to require one-half of the estimated fees before proceeding to process the request. In its written submission to our office, the Access Officer asserted as follows:

> *In addition, upon completion of the preparation of the record for disclosure, the number of photocopies and the search and preparation time and would charge the applicant the lesser of the actual allowable fees and the estimated fees. As such, given the previous decisions from the Commissioner and the foregoing process utilized by the corporation, it is our submission that the fee estimate proposed is reasonable."*

[64] The Applicant asserts that he sought existing records and "*did not seek existing records that would have necessitated hours of searching.*" He further claimed that another government institution had been able to retrieve documents responsive to an identical request without seeking fees. I would make two comments in respect of that argument:

1) Each head of a government institution must determine whether in any given case it will assert a claim for the fees prescribed by the Act and Regulation. That decision in no way can bind any other government institution even if dealing with an identical request for access.

2) Even if the decision of another head is relevant, the responsive records in one institution may be neatly consolidated and readily accessible and yet fragmented or difficult to retrieve in another institution. I am required to deal with the facts of the case before me in whatever form or format the record may exist.

[65] The position of SaskEnergy during this review was that all of the time represented by the fee estimate of 5 hours related to searching for responsive records. Consequently I find that there is no basis to allow SaskEnergy a fee for what has been described in the foregoing analysis as preparing the record for disclosure.

[66] In any event, on the basis of my interpretation of the Act and regulation and the approach taken by other Information and Privacy Commissioners, even if there was a claim for preparation time, such preparation time does not capture time spent contemplating, considering or discussing applicable exemptions.

6. CAN THERE BE A FEE/FEE ESTIMATE IF A RECORD IS SEVERED?

[67] The Applicant asserts that if SaskEnergy is using any part of the "preparation time" to edit the record for disclosure, no fee may be collected by reason of section 8(1) of the FOIP Regulation. That section states:

8(1) No fees are payable where access to a record is refused.

[68] That argument would be more persuasive if the regulatory provision referred to a denial of access to "information" in a "record". Given the plain meaning of the section 8 provision, I disagree with the Applicant's interpretation. I find that section 8 contemplates a situation where a government institution refuses all access to a record. This is consistent with the view expressed by former Commissioner Gerrand in Report 2001/015.

[69] Further, if the intention of the Assembly was to deny any fee if information is severed from a record, there would be little point in stipulating that a fee may include preparation time. Given the practice and experience in other Canadian jurisdictions, the major work that would constitute "preparation of the record" is the physical severing of portions of a record in accordance with mandatory or discretionary exemptions in the statute.

[70] If the government institution is prepared to provide access to a record from which portions have been severed, that government institution is entitled to charge fees for search and preparation of the record in accordance with the balance of the fee regulation.

7. HOW SHOULD A FEE ESTIMATE BE FURNISHED TO AN APPLICANT?

[71] In this case, the fee estimate from SaskEnergy was outlined in the letter to the Applicant from that organization's Access Officer. It did not distinguish between time dealing with electronic records and time dealing with hard copy records. It did not distinguish between "search time" and "preparation of record" time.

[72] Our office has seen a document utilized by some government institutions entitled *Estimate of Costs* produced by the Government of Saskatchewan. I understand that this form was initially prepared in 1992 as supplemental material to assist departments in the implementation of the legislation. This form is skeletal and does not distinguish between search time and preparation time. This form, when completed, would not provide the kind of detailed information that I find is required by the Act.

[73] I find that the fee estimate letter from SaskEnergy was inadequate.

[74] An appropriate written fee estimate notice to an applicant should include the following information:

1) Time required to search electronic records
2) Time to prepare electronic records for disclosure
3) Time required to search other records

4) Time required to prepare other records for disclosure
5) Number of persons that will be involved in the search or preparation for disclosure activities that will be claimed as compensable and an explanation as to why more than one person is required to be involved in either search or record preparation activities.

[75] The fee estimate should be accompanied by an interim notice. Such an interim notice would provide the applicant with an indication of whether access is likely to be granted in whole or in part, and what exemptions are likely to apply to the records. This information would greatly assist the applicant to determine whether he/she wishes to proceed with the entire request. Such an interim notice would not be a decision that could be the subject of a request for review by this office. The principles governing the issue of a fee estimate/interim notice are codified in Ontario IPC Order 81.

[76] I adopt the following statement by Ontario's first Information and Privacy Commissioner in Ontario IPC Order 81:

> *In my view, a requester must be provided with sufficient information to make an informed decision regarding the payment of fees, and it is the responsibility of the head to take whatever steps are necessary to ensure the fee estimate is based on a reasonable understanding of the costs involved in providing access. Anything less, in my view, would compromise and undermine the underlying principles of the Act.* [The underlying principles of the Saskatchewan Act are discussed in SK OIPC Report 2004-003, [5] to [11]].
>
> *How can a head be satisfied that the fees estimate is reasonable without actually inspecting all of the requested records? Familiarity with the scope of the request can be achieved in either of two ways: (1) the head can seek the advice of an employee of the institution who is familiar with the type and contents of the requested records; or (2) the head can base the estimate on a representative (as opposed to a random) sample of the records. Admittedly, the institution will have to bear the costs incurred in obtaining the necessary familiarity with the records, however is consistent with other provisions of the Act.*

...

The head's notice to the requester should not only include a breakdown of the estimated fees, but also a clear statement as to how the estimate was calculated (i.e. on the basis of either consultations or a representative sample.) While I would encourage institutions to provide requesters with as much information as possible regarding exemptions which are being contemplated, the head must make a clear statement in the notice that a final decision respecting access has not been made. Because the head has not yet seen all of the requested records, any final decision on access would be premature, and can only properly be made once all of the records are retrieved and reviewed. However, in my view, if no indication is made at the time a fees estimate is presented that access to the record may not be granted, it is reasonable for a requester to infer that the records will be released in their entirety upon payment of the required fees.

"Interim" section 26 decisions are not binding on the head and, therefore, cannot be appealed to the Commissioner.[28]

VI CONCLUSION

[77] I recognize that this Report is done many months after the Request for Review was received by this office. I also recognize that we are only dealing with a procedural matter and have not even begun to examine the merits of any exemption claims that may be asserted by SaskEnergy. I determined that it is important to take the time on this file to fully canvass the issues raised by this fee estimate review to clarify for SaskEnergy and other government institutions the view this office takes of the relevant statutory and regulatory provisions. In future reviews by this office of fees and fee estimates, we encourage government institutions to expedite issues related to fees and in turn our office will attempt to expedite our work to avoid undue prejudice to applicants.

[28] Page 6 and 7

[78] I wish to acknowledge the very thorough and helpful submissions made by both the Applicant and SaskEnergy and the assistance provided by both parties throughout this review of the fee estimates process.

VII RECOMMENDATIONS

[79] I find that the estimated photocopy charge of $118.75 conforms to the per page reproduction cost permitted by the Regulation.

[80] I find that the 1 hour spent by the Access Officer discussing the scope of the request, providing guidance in preparing for the search and for his initial review of the record to prepare the record for disclosure is non-compensable time under the Regulation.

[81] I find that time spent photocopying a record would be non-compensable time under the Regulation.

[82] I further find that although normally only one person's time would be compensable for purposes of fees and fee estimates, in the unique circumstances of this file it would be appropriate to allow 30 minutes for the Supervisor to participate in the search for responsive records.

[83] I recommend that the allowable time to search for responsive records would be 2 hours in total. After deducting the first two free hours, there would be no fee required to be paid by the Applicant.

[84] I recommend that there be no fee paid for preparing the record for disclosure since this was not part of the fee estimate prepared by SaskEnergy.

[85] I recommend that the photocopy charge of $118.75 be treated as an appropriate charge to which SaskEnergy is entitled subject to the opportunity for the Applicant to view the records and to determine that only certain of the responsive records need to be copied.

[86] I recommend that, in the future, when issuing a fee estimate pursuant to section 9(2) of the Act, SaskEnergy should indicate the following:

1) Time required to search for electronic records;
2) Time required to prepare electronic records for disclosure;
3) Time required to search for other records;
4) Time required to prepare other records for disclosure;
5) Number of persons that will be involved in the search or preparation for disclosure activities that will be claimed as compensable and an explanation as to why more than one person is required to be involved in either the search or record preparation activities.

[87] I recommend that, in the future, any fee estimate pursuant to section 9(2) of the Act should be accompanied by an interim notice from SaskEnergy that tentatively indicates whether access is likely to be granted in whole or in part and what exemptions are likely to apply to the records in question.

Dated at Regina, in the Province of Saskatchewan, this 20th day of July, 2005.

R. GARY DICKSON, Q.C.
Information and Privacy Commissioner for Saskatchewan

POSTSCRIPT

We note that the Saskatchewan Act does not provide, as do most other Canadian provinces, for a waiver of fees where that may be "in the public interest" regardless of the financial capacity of an applicant.[29] In Saskatchewan, other than the limited circumstances in sections 9(a) or (c) of the Regulation, there can be no fee waiver at any time unless the fees "*will cause a substantial financial hardship for the applicant*".

The experience in other jurisdictions is that there can be many circumstances where a fee waiver would be in the public interest even though the applicant is not impecunious. A good example is the decision of Mr. Justice T.F. McMahon, of the Court of Queens Bench of Alberta, who presided over a review of two fee estimates as an adjudicator. One applicant was an Opposition MLA - the second applicant was a Globe and Mail newspaper reporter. Justice McMahon reduced the fee estimate for the reporter from $60, 696 to $2, 500. He reduced the fee estimate to the MLA from 59, 571 to $500. He stated:

> *In the result, I conclude that access to the requested records would be of benefit to the Alberta public in a pursuit of openness and accountability in government affairs and the management of public funds. The records relate to a matter of public interest as described in s. 93(4)(b). The fees demanded of both applicants should be reduced or waived, except for the application fee of $25.00 if it was paid.*[30]

Although this present application was not for a fee waiver but for a review of the estimated fees claimed by SaskEnergy, we want to comment on a concern our office has with the current fee waiver provision. The applicant is a journalist. The fee waiver provision in the Regulation is, in our view, is unduly restrictive and precludes a fee waiver at any time for journalists, MLAs, and others who may serve the public interest by drawing attention to particular issues of public concern.

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[29] Manitoba, Reg. 9(1); *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993 c. 5 as am., section 11(7); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 as am., section 57(4); *Freedom of Information and Protection of Privacy Act*, S.P.E.I. 2001, c. 37 as am., section 76(4)

[30] Alberta Information and Privacy Commissioner, Adjudication Order #2, May 24, 2002, [72]. Available online at www.oipc.ab.ca.

I recommend that the Legislative Assembly consider creating a fee waiver in cases where there is a compelling public interest. In such a case, to be consistent with other jurisdictions, the burden of establishing that a fee waiver should be granted would be upon the applicant and not the government institution.[31]

[31] Policy and Procedures Manual, s. 75 –Fees, Ministry of Management Services, Government of British Columbia; available online at http://www.mser.gopv.bc.ca/privacyaccess/manual/sections/sec70_81/sec75.htm; Ontario Information and Privacy Commissioner Order PO-1953-F, available online at http:www.ipc.on.ca